THOMAS THOMAS v. TENAGA NASIONAL BHD

COURT OF APPEAL, PUTRAJAYA
MOHD ZAWAWI SALLEH JCA
VERNON ONG LAM KIAT JCA
ABDUL RAHMAN SEBLI JCA
[CIVIL APPEAL NO: W-04(IM)-8-01-2014]
5 JANUARY 2017

UTILITIES: *Electricity – Consumption and usage – Claim for loss of revenue – Tampered meter premises rented out to third party – Whether registered owner of premises liable to Tenaga Nasional Bhd for loss of revenue suffered – Whether fact that premises rented out to a third party a defence – Agreement for supply of electricity – Whether involved any third party*

The respondent ('TNB') carried out an inspection on its meter at the appellant's premises ('premises') and discovered that the meter had been tampered with. TNB then issued two notices of demand to the appellant to recover the loss of revenue. The appellant refused to pay, hence the present proceedings by TNB. In the appeal herein, the appellant appealed against the decision of the High Court which affirmed the Sessions Court decision which favoured TNB. It was the appellant's contention that although he was the registered owner of the premises, he was not the consumer of the electricity at the material time as the premises had been rented out to a third party. Therefore, the appellant argued that he was not responsible for any electricity charges incurred by his tenant during the tenancy period. The principal issue that arose for determination was whether the appellant was liable to pay the outstanding charges due to TNB although the premises was rented out to a third party.

Held (dismissing appeal with costs)
Per Abdul Rahman Sebli JCA delivering the judgment of the court:

(1) TNB's right to commence civil proceedings against its registered consumers for losses due to the commission of offences under s. 37(1), (3) and (14) of the Electricity Supply Act 1990 ('ESA') is covered by s. 38(3) to (5) of the ESA. For purposes of a claim under s. 38(3) to (5), it is not necessary for TNB to prove the identity of the person who damaged or tampered with the meter. (para 11)

(2) It was not TNB's case that it was the appellant who tampered with the meter. Its cause of action was simply based on the fact that the tampering of the meter had caused it to lose revenue. There is no requirement under the ESA that TNB must first prove that it was the registered consumer who damaged or tampered with the meter before it could succeed in its claim against the consumer under s. 38(3) to (5) of the ESA. To do so would lead to an absolute absurdity. (paras 13 & 14)

(3) Meter tampering, causing damage to meter or dishonest consumption of electricity are strictly criminal matters which do not and cannot affect TNB's right to recover loss of revenue by way of civil proceedings pursuant to s. 38(3) to (5). No registered consumer can walk away without paying anything to TNB on the ground that the meter had been damaged or tampered with without his knowledge. Further, a registered consumer cannot avail himself of such defence for the simple reason that it will result in unjust enrichment to the consumer. (paras 16 & 17)

(4) Although the premises was rented to and occupied by a third party and the appellant never occupied the premises, the appellant could not run away from the fact that the agreement for the supply of electricity to the premises was between him and TNB and did not involve any third party. It was the appellant's sole responsibility, being the 'consumer' under the agreement, to pay all outstanding charges due to TNB. (paras 19 & 20)

Bahasa Malaysia *Headnotes*

Responden ('TNB') telah menjalankan pemeriksaan ke atas meter di premis perayu ('premis') dan mendapati bahawa meter telah diusik. TNB kemudiannya mengeluarkan dua notis tuntutan kepada perayu untuk mendapatkan semula kehilangan pendapatan. Perayu enggan membayar, Oleh itu, prosiding ini oleh TNB. Dalam rayuan ini, perayu merayu terhadap keputusan Mahkamah Tinggi yang mengesahkan keputusan Mahkamah Sesyen yang berpihak pada TNB. Perayu menghujahkan bahawa walaupun perayu adalah pemilik berdaftar premis tersebut, dia bukanlah pengguna elektrik pada ketika itu kerana premis tersebut telah disewakan kepada pihak ketiga. Oleh itu, perayu menegaskan bahawa dia tidak bertanggungjawab terhadap apa-apa caj elektrik yang dikenakan oleh penyewanya semasa tempoh penyewaan. Isu utama yang dibangkitkan untuk penentuan ialah sama ada perayu bertanggungjawab membayar caj-caj tertunggak yang perlu dibayar kepada TNB walaupun premis tersebut disewakan kepada pihak ketiga.

Diputuskan (menolak rayuan dengan kos)
Oleh Abdul Rahman Sebli HMR menyampaikan penghakiman mahkamah:

(1) Hak TNB untuk memulakan prosiding sivil terhadap pengguna berdaftar bagi kerugian akibat perlakuan kesalahan di bawah s. 37(1), (3) dan (14) Akta Bekalan Elektrik 1990 ('ESA') dirangkumi oleh s. 38(3) hingga (5) ESA. Bagi maksud tuntutan di bawah s. 38(3) hingga (5), TNB tidak perlu membuktikan identiti orang yang merosakkan atau mengusik meter.

(2) Kes TNB bukan bahawa perayu yang mengusik meter. Kausa tindakan TNB adalah bahawa ia kehilangan pendapatan disebabkan oleh pengusikan meter. Tiada keperluan bawah ESA bahawa TNB mesti

membuktikan bahawa ia adalah pengguna berdaftar yang merosakkan atau mengusik meter sebelum ia boleh berjaya dalam tuntutan terhadap pengguna di bawah s. 38(3) hingga (5) ESA. Berbuat demikian akan membawa kepada ketidakmunasabahan.

(3) Pengusikan meter, menyebabkan kerosakan kepada meter atau penggunaan elektrik secara tidak jujur adalah perbuatan jenayah yang tidak akan dan tidak boleh menjejaskan hak TNB untuk mendapatkan semula kehilangan pendapatan melalui prosiding sivil menurut s. 38(3) hingga (5). Tiada pengguna berdaftar yang boleh dilepaskan tanpa membayar apa-apa kepada TNB atas alasan bahawa meter telah dirosakkan atau diusik. Juga, pengguna berdaftar, tidak boleh penggunakan pembelaan tersebut atas alasan mudah bahawa ia akan menyebabkan kekayaan tidak adil kepada pengguna.

(4) Walaupun premis tersebut telah disewakan dan diduduki oleh pihak ketiga dan perayu tidak pernah menduduki premis tersebut, perayu tidak boleh melarikan diri daripada fakta bahawa perjanjian bagi pembekalan elektrik kepada premis tersebut adalah antara perayu dan TNB dan tidak melibatkan mana-mana pihak ketiga. Tanggungjawab perayu, sebagai 'pengguna' di bawah perjanjian, adalah untuk membayar semua caj tertunggak yang perlu dibayar kepada TNB.

Case(s) referred to:
Tenaga Nasional Berhad v. Empayar Canggih Sdn Bhd [2013] 1 LNS 637 HC ***(foll)***

Legislation referred to:
Contracts Act 1950, s. 71
Electricity Supply Act 1990, ss. 37(1), (3), (14), 38(3), (4), (5)

For the appellant - Sitpah Selvaratnam & Michael Yap; M/s Tommy Thomas
For the respondent - Hadi Mukhlis; M/s Shook Lin & Bok

[Editor's note: Appeal from High Court, Kuala Lumpur; Civil Appeal No. 12A-349-06-2012 (affirmed).]

Reported by Sandra Gabriel

JUDGMENT

Abdul Rahman Sebli JCA:

[1] The appellant's appeal is against the decision of the Kuala Lumpur High Court affirming the decision of the Sessions Court which favoured the respondent ("TNB") in its claim against the appellant for loss of revenue as a result of meter tampering discovered at the premises known as No. 34, Changkat Bukit Bintang, Kuala Lumpur ("the premises"). Having heard arguments, we reserved judgment to a date to be fixed. This then is our unanimous decision.

[2] The following facts have been established beyond dispute:

(a) TNB is a licensee under the Electricity Supply Act 1990 ("the ESA").

(b) At all material times the appellant was the owner of the premises.

(c) The appellant was TNB's registered consumer for the premises with account No. 012364675401.

[3] On 16 January 2008, TNB carried out an inspection on its meter at the premises and discovered that the meter had been tampered with, subsequent to which TNB lodged a police report. Meter tampering, dishonest consumption of electricity and damaging any meter are offences under s. 37(1), (3) and (14) respectively of the ESA.

[4] TNB's calculation of its loss of revenue as a result of the tampering was RM77,318.67, which covered the period between 22 September 2004 and 21 December 2007.

[5] TNB then issued two notices of demand to the appellant to recover the loss of revenue. The appellant refused to pay, hence the present proceedings commenced by TNB in the Sessions Court.

[6] At the trial, the focal point of the appellant's defence was that the premises had already been rented out to a third party, namely 'The Moghul House Sdn Bhd' ("Moghul House") at the time he purchased the property from one 'Straits Merchant Sdn Bhd'. He never occupied the premises and had nothing to do with the tampering of the meter. What the appellant was suggesting in effect was that he could not be made liable for something that he was not responsible for.

[7] In his grounds of judgment, the learned High Court Judge noted that the appellant had obtained judgment against Moghul House for breach of the tenancy agreement and its failure to pay for the electricity and other utility charges. The judgment sum however remained wholly unsatisfied.

[8] It was the appellant's contention that although he was the registered owner of the premises, he was not the consumer of the electricity and that therefore he was not responsible for any electricity charges incurred by his tenant during the tenancy period, let alone the RM77,318.67 claimed by TNB.

[9] In this respect the facts are strikingly similar to the facts in *Tenaga Nasional Berhad v. Empayar Canggih Sdn Bhd* [2013] 1 LNS 637; [2014] 8 MLJ 280 where Lee Heng Cheong J decided as follows:

> I find that the Defendant is liable to the Plaintiff in its claim for the loss of revenue under ss. 38(3) to (5) of the Act as the Defendant was at all material times, the registered consumer of the plaintiff. The Plaintiff's E-CIBS System [Exhibit 1] showed that the Defendant is the registered consumer and Exhibit P24, the Power Supply Agreement dated 4/9/1998

showed that the Defendant is the "consumer" of the electricity supplied to the Defendant's premises. Further the monthly electricity bills for the electricity supplied to the Defendant's premises [Exhibit P26] are issued in the Defendant's name. Thus the Defendant is responsible for the same.

I find the Defendant's contention, that at the material time, the Defendant's premise was rented out to Kemboja Jaguh Sdn Bhd [refer to paras 5.3 to 5.8 of the Defence] to be without merits as the supply of electricity to the Defendant's premises is based on the Power Supply Agreement between the Plaintiff and the Defendant [see exhibit P24] which at all material times, was valid and subsisting. Further the Plaintiff's system still shows the Defendant as the registered consumer and the monthly consumer bills for the Defendant's premises are still issued in the name of the Defendant. There was no evidence that the Defendant has requested or managed to get the said Kemboja Jaguh Sdn Bhd to supply for a new meter or account with the Plaintiff. Further the premise is owned by the Defendant and as such the Defendant is duly liable.

[10] We are in full agreement with the reasoning of the learned judge, which we find to be sound and in conformity with the legislative scheme of the ESA as a whole and s. 38(3) to (5) in particular. The judgment was not referred to by the learned Sessions Court Judge who tried the case nor by the learned High Court Judge who heard the appeal, but in our view it is relevant and applicable to the facts and circumstances of the present case.

[11] TNB's right to commence civil proceedings against its registered consumers for losses due to the commission of offences under s. 37(1), (3) and (14) of the ESA is covered by s. 38(3) to (5) of the ESA. For purposes of a claim under s. 38(3) to (5), we take the view that it is not necessary for TNB to prove the identity of the person who damaged or tampered with the meter.

[12] Section 38(3) to (5) is couched in the following language:

(3) The licensee may require the consumer to pay him the loss of revenue due to the offence committed under section 37(1), (3) and (14) and any expenses incurred by the licensee under this section including expenses incurred in respect of the reconnection of electricity supply.

(4) A written statement by an employee of the licensee duly certified by the licensee or any person authorized by the licensee specifying:

(a) the amount of loss of revenue or the expenses incurred by the licensee; and

(b) the person liable for the payment thereof,

shall be *prima facie* evidence of the payment that has to be made by the consumer under subsection (3).

A (5) The amount stated in the written statement shall, within the period specified in the statement, be due and payable to the licensee and in default of payment such amount shall be recoverable by civil action in court.

[13] In any event, it was not TNB's case that it was the appellant who B tampered with the meter. Its cause of action was simply based on the fact that the tampering of the meter had caused it to lose revenue. The fact is, there is no requirement under the ESA that TNB must first prove that it was the registered consumer who damaged or tampered with the meter before it could succeed in its claim against the consumer under s. 38(3) to (5). Section C 38(1) speaks of "an offence has been committed" and not "an offence has been committed by the registered consumer".

[14] To require TNB to prove that the offence of tampering was committed by the registered consumer before it could succeed in its claim for loss of revenue would lead to an absolute absurdity whereby the registered D consumer will escape liability if he is "ingenious" enough to engage a third party to damage or tamper with the meter in preparation for his refusal to pay for any loss of revenue suffered by TNB resulting from the tampered or damaged meter.

[15] Being a commercial contract, we do not think it will be commercially E sensible to construe the contract between the appellant and TNB as requiring TNB to first prove that the damage or tampering was done by the appellant before it could succeed in its claim. Such proof would only be required if the appellant had been charged with any of the offences relating to meter tampering specified in s. 37 of the ESA.

F **[16]** Meter tampering, causing damage to meter or dishonest consumption of electricity are strictly criminal matters which do not and cannot affect TNB's right to recover loss of revenue by way of civil proceedings pursuant to s. 38(3) to (5). No registered consumer can walk away without paying anything to TNB on the ground that the meter had been damaged or tampered G with without his knowledge.

[17] In our view, in an action by TNB to recover loss of revenue resulting from meter tampering, a registered consumer cannot avail himself of such defence for the simple reason that it will result in unjust enrichment to the consumer. He can only be absolved of liability if he can show that no H electricity was consumed at the premises during the period that the meter was tampered with.

[18] It is not open to the appellant to say that he did not "benefit" from the consumption of the electricity on the ground that the premises had been I "continuously occupied by an unbroken chain of tenants". The simple truth is, the premises belonged to him and he was the registered consumer under account No. 012364675401. Section 71 of the Contracts Act 1950 therefore comes into play. The provision reads:

71. Obligation of person enjoying benefit of non-gratuitous act

Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

[19] It is true that the premises was rented to and occupied by a third party and the appellant never occupied the premises, but the appellant cannot run away from the fact that the agreement for the supply of electricity to the premises was between him and TNB and did not involve any third party.

[20] Therefore, as far as consumption of electricity in the premises is concerned, it was the appellant's sole responsibility, being the "consumer" under the agreement, to pay all outstanding charges due to TNB. On the evidence as found by the learned Sessions Court Judge and as affirmed by the learned High Court Judge on appeal, electricity had in fact been consumed during the period from 22 September 2004 to 21 December 2007. It is irrelevant who actually consumed the electricity.

[21] As TNB's registered consumer, it was the appellant's responsibility to ensure that the meter at the premises was not damaged or tampered with. This responsibility remains with the appellant throughout the duration of the agreement unless by his tenancy agreement with the tenant, he had assigned such responsibility to the tenant. Even then such agreement would not bind TNB, not being a party to the tenancy agreement.

[22] Thus, where the meter was damaged or tampered with by the tenant or the occupier with or without the appellant's permission or by anyone else during the agreement period, the appellant must pay for the resulting loss of revenue suffered by TNB, not because he had anything to do with the tampering or damage caused to the meter but because he was bound by agreement to pay for the electricity charges. The loss of revenue under such circumstances cannot fall on TNB's head. That will be grossly unfair to TNB.

[23] If it was the appellant's case that it was Moghul House who should bear responsibility for the outstanding electricity charges, his recourse was to bring in Moghul House as a third party and not to deflect liability away from himself and denying TNB of its rightful claim to revenue that was lost due to tampering or damage to the meter.

[24] As we mentioned in passing earlier, the learned High Court Judge noted that the appellant had obtained judgment against Moghul House for breach of the tenancy agreement and for its failure to pay electricity and other utility charges. This and the fact that the judgment in favour of the appellant remained wholly unsatisfied does not relieve the appellant of his liability under the agreement to pay all outstanding charges due to TNB.

[25] The judgment debt owed by Moghul House to the appellant is totally irrelevant to the question of whether the appellant is liable to pay the outstanding charges due to TNB. That is entirely a matter for the appellant to sort out with Moghul House.

[26] All that TNB needed to do in order to sustain its claim against the appellant was to prove the following on the balance of probabilities:

(a) TNB is a licensee under the Electricity Supply Act 1990 ("the ESA")

(b) The appellant was TNB's registered consumer of electricity supplied to the premises.

(c) Its meter at the premises had been tampered with, making it impossible to record the correct amount of electricity supplied to the premises for the period from 22 September 2004 to 21 December 2007.

(d) The tampering caused it to suffer loss of revenue in the sum of RM77,318.67 for the period from 22 September 2004 to 21 December 2007.

[27] All four are essentially questions of fact and all four had been decided in favour of TNB by both the Sessions Court and the High Court. These findings of fact can only mean that TNB's claim against the appellant had been proved.

[28] The principle in appellate intervention on such findings of fact is well settled, that an appellate court will be slow to interfere with such findings unless it can be shown that no reasonable tribunal properly appraised of the facts and the law would have arrived at such conclusion. In the present case, we find no valid reason to interfere with the concurrent findings of the courts below.

[29] In the circumstances, the appellant's appeal is dismissed with costs.

[30] Not all is lost though for the appellant. He can still pursue his grievance in the Federal Court in order that his rights can finally be determined by the apex court. As can be seen from learned counsel's written submissions, he is fully aware of the conflicting decisions of this court on the issue of law involved in relation to similar claims by TNB. As a matter of fact a number of such cases are pending before the Federal Court even as we deliver this judgment.